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IN ARBITRATION UNDER THE COMMERCIAL ARBITRATION
RULES OF THE
AMERICAN ARBITRATION ASSOCIATION
Case No. 01-17-0005-3636

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State of New York,
Claimant,
v.
Seneca Nation of Indians,
Respondent.
-----X

TRANSCRIPT OF PROCEEDINGS
New York, New York
December 12, 2018

BEFORE: HON. JUDGE WILLIAM BASSLER
HENRY GUTMAN, ESQ.
KEVIN N. WASHBURN, ESQ.

Reported by: BONNIE PRUSZYNSKI, RMR, RPR, CLR
JOB NO. 152544

December 12, 2018
10:39 A.M.

Transcript of Arbitration
Proceedings held at the offices of AAA, 150 East
42nd Street, New York, New York, before Bonnie
Pruszynski, a Registered Professional Reporter,
Registered Merit Reporter, Certified Livenote
Reporter, and Notary Public of the State of New
York.

A P P E A R A N C E S:

WHITE & CASE

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and

LIPPES, MATHIAS, WEXLER, FRIEDMAN

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Also Present:

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Lauri Kai

Robert Williams

For Respondent: Michele Mitchell

Sandy Park, Assistant to the Panel

Proceedings

CHAIRPERSON BASSLER: Good morning, everyone. Just a couple of preliminary remarks before we get started, break the ice.

First of all, the panel thanks counsel and the parties for the opportunity to be engaged in this matter. We appreciate that, something particularly as important as this.

We also want to express our appreciation for the quality of the briefs that have been filed. We have given them serious consideration.

We have not had an opportunity to talk among ourselves, and I say that because we have -- we have no fixed ideas as to the outcome here, and so we are looking forward to a very engaged conversation. This is for us, and I know for you, not a perfunctory experience.

I also want to thank you for giving us the chance to bring Sandy Park on board. Sandy, I was very fortunate having her clerk for me for several

Opening Statement by Mr. Friedland running. So, in the first phase of the sliding scale, its percentage owed is at its lowest. It progressively gets higher. It ends up at 25 percent when its casino are fully up and running, and the Nation's position is that upon renewal at that point, its payment obligation went from 25 percent to zero, notwithstanding that its casinos were of course fully up and running throughout renewal, and notwithstanding that exclusivity has continued throughout renewal.

So, a first question that you might ask yourselves and we all might ask ourselves, where the Nation's primary, not sole but primary obligation under the compact was to pay exclusivity payments, and where the primary, not sole but primary consideration flowing to the State was to receive exclusivity payments, if this fundamental contractual equilibrium were to vanish upon renewal, does your judgment and common sense tell

Opening Statement by Mr. Friedland you that the compact might have said so?

To formulate this a little bit differently, given that the Nation owed 25 percent quarterly, at the time of renewal, if the parties' agreement were that upon renewal the Nation would pay zero, or close to zero, do you think that the compact would simply provide for renewal and say nothing about no payment being owed?

Another question we might all ask ourselves is, if a deal of this magnitude were struck during the negotiation of the compact, hundreds of millions of dollars turn on this deal, do you think that this might have been mentioned during the negotiation of the compact? Is it conceivable to you, as a matter of your judgment and common sense, that in a negotiation where there is extensive written back and forth, transcripts of negotiating sessions, the agreement that nothing would be paid during renewal was nowhere mentioned?

Opening Statement by Mr. Friedland

Now, you might also ask yourselves, if the Nation had negotiated a deal of this nature, where they get a freebie for seven years, when the Nation developed talking points to explain to its tribal members what a great deal had been negotiated on their behalf, do you think they would have mentioned this? And when the Nation wrote to the Department of Interior to get approval of the compact, in the context where the Nation needed to explain to Interior that its exclusivity payments in context didn't amount to that much, and therefore didn't constitute an illegal tax, do you think they might have mentioned that they negotiated 21 years of exclusivity for 14 years of payment?

Now, the author of that letter happened to be the chief negotiator of the compact on behalf of the Nation, Donald Pongrace, a partner at Akin Gump. He remains the Nation's counsel. He is available to be here.

So a final question you might ask

Opening Statement by Mr. Friedland yourself is, if Pongrace had really negotiated and secured this deal on behalf of the Nation, do you think he might be here to tell you this?

So I'm going to move on to the language of the compact now, and we have a little booklet which is photocopies of exhibits from the record which we are going to distribute now.

CHAIRPERSON BASSLER: Okay.

MR. FRIEDLAND: Now, I should say these are exhibits. It's going to take me a while before we get to this booklet actually.

I don't even think we need this audio. Do we need the mike or it's fine without it?

CHAIRPERSON BASSLER: Try without it and see.

MR. FRIEDLAND: Okay. You have been hearing me fine so far?

CHAIRPERSON BASSLER: Yes.

How about over here?

MS. HECKMAN: It's fine.

1 Opening Statement by Mr. Kanji
 2 You know full well then, Judge
 3 Bassler, that New York law is extremely
 4 strong on this idea that --

5 CHAIRPERSON BASSLER: I do.

6 MR. KANJI: Right, exactly.

7 And I think one of the -- what I
 8 want to underscore, just the reasons why
 9 the New York and the federal courts have
 10 taken that position and how it relates to
 11 what we are going to hear about today.

12 The -- as the New York Court of
 13 Appeals --

14 CHAIRPERSON BASSLER: Do we have
 15 closing arguments? I forgot.

16 MS. HECKMAN: Yes.

17 MR. FRIEDLAND: It remains to be
 18 discussed.

19 CHAIRPERSON BASSLER: Oh, okay.

20 MS. HECKMAN: Well, they were
 21 provided for in the procedural order
 22 number one, and we talked about it at the
 23 end of November.

24 CHAIRPERSON BASSLER: Yeah, okay.
 25 The answer is we do.

1 Opening Statement by Mr. Kanji
 2 Second Circuit loves Judge Posner.

3 MR. KANJI: Yes.

4 CHAIRPERSON BASSLER: We got it.

5 MR. KANJI: And it's Judge Posner,
 6 it's Justice Brandeis in Arizona v.
 7 California, and the reasons that they say
 8 are because negotiator testimony can
 9 inherently be self-serving, and
 10 inherently --

11 CHAIRPERSON BASSLER: We got it.

12 MR. KANJI: -- subject to the
 13 vagaries of memory.

14 I want to underscore two points.
 15 That is the reason why we do not have
 16 Mr. Pongrace here today, because we are
 17 not going to urge on this panel the
 18 position that self-serving negotiator
 19 testimony should not be entertained.

20 CHAIRPERSON BASSLER: But we don't
 21 know -- he is not here. We don't know
 22 whether it's self-serving or not. Maybe
 23 it wouldn't be self-serving, or maybe it
 24 would be self-serving and there would be
 25 an objection to it. We just don't know.

1 Opening Statement by Mr. Kanji

2 MR. FRIEDLAND: Okay.

3 CHAIRPERSON BASSLER: Forewarned is
 4 forearmed.

5 MR. KANJI: Certainly
 6 calibrating --

7 CHAIRPERSON BASSLER: I'm just
 8 wondering whether this -- this discussion
 9 is best left for the closing argument.
 10 But look, it's your time, go ahead.

11 MR. KANJI: Well, I think taking my
 12 cues, I will abbreviate the discussion
 13 about the legal principles. I will
 14 summarize them, which is as following.

15 Both the state court and the
 16 federal courts have been very clear that
 17 even if extrinsic evidence is
 18 entertained, in the event of ambiguity,
 19 that what the courts should not
 20 entertain, what should not be given any
 21 weight --

22 CHAIRPERSON BASSLER: We got it.
 23 Judge Posner.

24 MR. KANJI: Exactly, Judge Posner.

25 CHAIRPERSON BASSLER: New York

1 Opening Statement by Mr. Kanji
 2 Maybe it wouldn't be self-serving.

3 Was he the negotiator for the
 4 contract? Did he draft this? Was he a
 5 draftsman?

6 MR. KANJI: He was the Nation's
 7 lead negotiator, part of the negotiating
 8 team.

9 CHAIRPERSON BASSLER: But I mean,
 10 did he draft it?

11 MR. KANJI: He had some role in the
 12 drafting.

13 CHAIRPERSON BASSLER: Who else had
 14 a role in the drafting?

15 MR. KANJI: Well, he had other --
 16 there is sort of a multi-headed monster,
 17 but there were other lawyers in his firm,
 18 the Akin Gump firm, who played a role.
 19 The Nation had a negotiating committee
 20 that also consisted of Nation counsel and
 21 Nation leaders.

22 CHAIRPERSON BASSLER: Thank you.
 23 Okay.

24 MR. KANJI: So, it was a
 25 multi-group effort.

1 Opening Statement by Mr. Kanji
2 verge of collapse, but the parties
3 decided to try to forge ahead with
4 putting together a memorandum of
5 understanding.

6 But then here is where the
7 infirmities in Mr. Williams' testimony
8 become very clear, because after May 21,
9 Mr. Williams has very little to say about
10 how the parties actually got to an
11 agreement that was embodied in the
12 memorandum of understanding that they
13 came to on June 20th. That month-long
14 period is virtually absent from his
15 account, and it's virtually absent in a
16 couple of notable ways.

17 One, Mr. Williams notes stop on
18 May 21st. We have no notes after
19 May 21st. So, Mr. Friedland said in his
20 statement that we have transcripts of the
21 negotiations, we have these written
22 records. We do not. We do not. We have
23 no transcripts to begin with. All we
24 have are Mr. Williams' notes, and those
25 notes stop before the critical

1 Opening Statement by Mr. Kanji
2 discussions took place that got the
3 parties to an agreement.

4 Secondly, not only do we not have
5 notes, but in Mr. Williams' account,
6 proffered to this panel, we did not have
7 the critical exchange of drafts between
8 the parties that went to this very
9 specific issue.

10 And if we can put up slide 28.

11 This slide shows the critical
12 exchange of drafts as the parties shifted
13 from this revenue-based model to a model
14 based on periods of time, which of course
15 is where we ended up with in the compact.

16 When the parties shifted to this
17 model, it was the Nation who initiated
18 the drafts on this, and as you see from
19 this chronology, on June 5th of 2001,
20 nowhere reflected in Mr. Williams' notes,
21 because we don't have them, the Nation
22 proposed payments based on two time
23 periods: years one to seven and years
24 eight to 14, 16 percent and 22 percent
25 payments.

1 Opening Statement by Mr. Kanji
2 Six days later, the Nation tweaked
3 its proposal, and in some ways bidding
4 against itself, kept to the years one to
5 seven and years eight to 14 periods, but
6 shifted the payments up a little bit,
7 18 percent and 22 percent.

8 And now here is the critical draft
9 and the critical point, and this is what
10 was missing from Mr. Williams' initial
11 testimony to this panel. On June 12th,
12 the next day, the State countered, and it
13 was Patrick Kehoe who was one of the
14 State's lead negotiators, who is not
15 here. Mr. Kehoe counters, sends a draft,
16 which provides for three payment periods,
17 and the critical point, of course, is
18 that the third and final of those payment
19 periods was years seven plus.

20 We have three periods. We have one
21 to four, five to seven, and years seven
22 plus, which clearly would have provided
23 for payments through the lifetime of the
24 compact, whatever that lifetime ended up
25 being, 25 percent payments.

1 Opening Statement by Mr. Kanji
2 That is the State's position today
3 in front of the panel, is that this is
4 what the compact requires the Nation to
5 do. That was the State's proposal on
6 June 12th, not a word about it from
7 Mr. Williams or the State in their
8 submissions to this panel, their initial
9 submissions, even though this was a State
10 document, and this was a document that
11 the parties had provided to one another
12 in connection with our last arbitration,
13 not part of the purportedly comprehensive
14 and detailed account of the negotiations.

15 Then -- that is the State's
16 proposal, years seven plus. Eight days
17 later, after rounds of intense
18 negotiations, the parties reached their
19 agreement that was embodied in the
20 memorandum of understanding and in the
21 compact. And the critical point, of
22 course, is that in place of the years
23 seven plus, the parties reverted to the
24 State's -- I'm sorry, to the Nation's
25 idea that there would be three finite